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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Luhr Brothers, Inc.

File: B-248423

Date: August 6, 1992

S. Leo Arnold, Esq., Ashley, Ashley & Arnold, for the protester.

Daniel C. Sauls, Esq., and Carol R. Miaskoff, Esq., Steptoe & Johnson, for Great Lakes Dredge & Dock Company, an interested party.

Lester Edelman, Esq., and Scott Lawson, Esq., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that the structure of an invitation for bids (IFB) for dredging services was flawed because, among other things, the IFB required bidders to calculate their own production rate for their respective dredges, is untimely where the protester complained to the agency prior to submitting its bid but did not protest to General Accounting Office until it learned that it had not been selected for award.

2. Protester's claim that awardee's bid should be rejected as nonresponsive is denied where all the terms of the price schedule and equipment schedule were completed; no conditions or limitations were placed on the awardee's commitment to perform the dredging work required by the solicitation; and the agency's concerns about the awardee's bid went to capacity to perform as promised, not whether the awardee was committed to perform.

DECISION

Luhr Brothers, Inc. protests the award of a contract to Great Lakes Dredge & Dock Company under invitation for bids (IFB) No. DACW27-92-B-0018, issued by the Army Corps of Engineers for maintenance dredging of the navigation channel of the Ohio River and its principal tributaries, as well as portions of the upper Mississippi River. In its initial protest, Luhr argues that the Army improperly accepted a nonresponsive bid from Great Lakes and that the IFB was defective. In its comments on the agency report, Luhr

argues that Great Lakes's bid should have been considered a mistaken bid that could not properly be corrected--i.e., Great Lakes should not have been permitted to modify the equipment specified in its bid--and that Great Lakes should not have been considered a responsible bidder.

We deny the protest.

All of Luhr's complaints in this protest focus on a new element of the bid schedule used by the Corps in its solicitation for dredging work--the inclusion on the bid schedule of a bidder-generated guaranteed production rate, which then determines the number of hours required to complete the job. As described in greater detail below, since the production rate determines the length of the job, the rate has a large impact on the total bid price. According to Luhr, since the Corps initially concluded that Great Lakes's dredge could not operate at the guaranteed production rate stated in the bid, and since the rate was a key element in calculating the total price, the bid was nonresponsive. In our view, nothing about the Great Lakes bid raises issues of responsiveness. We also find reasonable the Corps's decision to require Great Lakes to modify its proposed equipment.

BACKGROUND

The Corps issued the IFB on December 24, 1991, seeking bids to furnish, deliver, and operate one cutterhead pipeline hydraulic dredge having a pump discharge of not less than 20-inch diameter. Section M of the IFB set forth several criteria for evaluating bids, and provided additional information about the work to be performed. This information included an estimated amount of material to be dredged (1.5 million cubic yards) and an estimated specific gravity--i.e., density--of the material to be dredged (1.3).

An equipment schedule at section B of the IFB required bidders to identify their intended dredging equipment and to provide extensive information about the configuration of the equipment. Of relevance here, paragraph a.3. of the equipment schedule required bidders to identify the following information about the pump used on their dredge: the make of the pump; the diameter of the suction pipe; the diameter of the discharge pipe; the maximum operation speed; the diameter of the impeller; and the pump's efficiency.

In addition, the price schedule within the IFB, also part of section B, required bidders to provide a guaranteed production rate for their dredging equipment stated as the number of cubic yards of material to be removed per hour. To calculate this production rate, bidders were to consider the estimate of the specific density of the material (provided by the agency in section M), in light of the capacity of

their respective dredges (provided by the bidder on the equipment schedule). After calculating the production rate, and identifying the rate on the bid schedule, bidders were to divide the production rate into the estimated 1.5 million cubic yards of material to be dredged to compute the number of hours required to complete the job. Using the number of hours derived from the above calculation, bidders then quoted an hourly price for the work, which when multiplied by the number of estimated hours formed much of the total bid price.¹

Prior to submitting a bid, Luhr complained to the Corps that the IFB was too indefinite and stated that the company was having difficulty calculating its production rate. Luhr states that the agency took no corrective action in response to its complaint, and instead advised Luhr that calculating a production rate--and thus determining the number of hours required to perform the work--was the bidder's responsibility, not that of the agency.

On January 23, the Corps received bids from two bidders: Luhr and Great Lakes. Although Great Lakes submitted the lower bid, its hourly price was higher than Luhr's because Great Lakes claimed a higher production rate. The claimed production rates, hourly rates, and bid prices were as follows:

	<u>Production Rate²</u>	<u>Hourly Rate</u>	<u>Total Bid Price</u>
Great Lakes	870 cy/hr	\$ 1,225	\$ 3,595,399
Luhr	582 cy/hr	1,014	3,778,773

In a letter dated January 27, 4 days after bid opening, Luhr complained to the Corps that Great Lakes's dredge did not appear capable of achieving the 870 cy/hr guaranteed production rate claimed on the pricing schedule. Upon review, the Corps agreed with Luhr's assessment of the capabilities of Great Lakes's dredge. Specifically, the Corps concluded that the 31-inch suction pipe identified by Great Lakes on its equipment schedule would not provide sufficient suction velocity to meet the claimed production rate of 870 cy/hr.

As a result--while not agreeing that its initial equipment configuration would fail to provide the production rate claimed--Great Lakes agreed to decrease the diameter of its suction pipe from 31 inches to 28.5 inches, thus increasing

¹Other factors--such as a bidder's charge for leasing disposal equipment--also contributed to the total bid price. However, those factors are not at issue here.

²The abbreviation cy/hr stands for cubic yards per hour.

the suction velocity within the pipe. After reviewing the proposed change, the contracting officer decided to award the contract to Great Lakes. This protest followed.

DISCUSSION

Luhr claims that Great Lakes's bid was nonresponsive since Great Lakes had to alter its bid after bid opening by changing the size of the suction pipe specified on the equipment schedule. In addition, Luhr complains that the IFB used by the Corps was flawed in that it did not provide a pre-established production rate, and did not assure that award to the low bidder would result in the lowest cost to the government. According to Luhr, by overstating the production rate of its dredge, Great Lakes's bid understates the number of hours required for the dredging. Since the IFB anticipated paying bidders by the hour, and since Great Lakes's hourly rate is higher than Luhr's (\$1,225/hr versus \$1,014/hr), Luhr insists that the Corps will ultimately pay more for the dredging by accepting Great Lakes's bid than it will by accepting Luhr's bid.

At the outset, to the extent that Luhr is complaining about the terms of the IFB--including the fact that the IFB required contractors to calculate their own production rate, and the fact that the low overall bidder might not be the bidder with the lowest hourly rate for dredging--the protest is untimely and will not be considered. Our Bid Protest Regulations provide that challenges to the terms of a solicitation apparent prior to bid opening must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1992). The purpose of this rule is to enable our Office to review such matters in time to take effective action where appropriate. GM Plastics, Inc., B-235083, Apr. 24, 1989, 89-1 CPD ¶ 405.

Here, Luhr was aware of its concerns about this solicitation in advance of submitting its bid, and, in fact, admits that it raised these issues with the contracting office before bidding, only to receive a response Luhr considered inadequate. According to Luhr--a long-time participant in competitions for the Corps's dredging work--this is the first IFB where bidders were required to establish their own production rates in order to determine how many hours to bid.³ However, since Luhr did not raise its concerns about

³In the previous solicitation for this work, the Corps similarly provided bidders with estimates of the amount of material to be dredged and the specific gravity of the material. However, in that solicitation, the Corps provided bidders with a table showing estimated dredge outputs in cubic yards per hour based on the size of the bidder's suction pipe, and other related factors. Bidders were

this IFB to our Office prior to submission of bids--in fact, Luhr did not complain until it was advised that award would be made to Great Lakes--its protest is untimely in this regard.

With respect to Luhr's claim that Great Lakes's bid is nonresponsive, Luhr concedes that questions of a bidder's ability to perform in accordance with the terms of its bid are generally matters of responsibility, not responsiveness, and can be determined at any time prior to award. See D.M. Wilson Lumber, Inc.--Recon., B-239136.2, May 18, 1990, 90-1 CPD ¶ 489. Luhr argues, however, that the bidder-generated production rate in this IFB is so much a part of the price structure that it has been elevated to a matter of responsiveness.

A responsive bid unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with all the IFB's material terms and conditions. Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342. If in its bid a bidder attempts to impose conditions that would modify material requirements of the invitation, limit its liability to the government, or limit rights of the government under any contract clause, then the bid must be rejected. Federal Acquisition Regulation (FAR) § 14.404-2; Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555. Responsibility, on the other hand, refers to a bidder's capacity to perform all contract requirements, see FAR § 9.104-1, and is determined not at bid opening, but at any time prior to award based on information received by the agency up to that time. D.M. Wilson Lumber, Inc.--Recon., supra.

To determine the responsiveness of a bid, we look to the face of the bid documents as they appear at the time of bid opening. Haz-Tad, Inc.; Hazeltine Corp.; Tadiran, Ltd., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. Here, all the terms of the price schedule and equipment schedule were completed, and no conditions or limitations were placed on Great Lakes's commitment to perform the work. In fact, the only change made to Great Lakes's bid between bid opening and award was the size of the suction pipe identified in the equipment schedule appended to the price schedule in the bid. As explained above, the Corps initially concluded that the Great Lakes dredge would be unable to achieve the claimed production rate of 870 cy/hr because of its 31-inch suction pipe. As a result, Great Lakes agreed to modify its dredge and use a 28.5-inch suction pipe.

required to use the output figure corresponding to the equipment specified to determine the number of hours required to complete the work.


The IFB did not require bidders to commit themselves to use the specified dredge; rather, the required commitment was to perform at the guaranteed production rate. Accordingly, with respect to the Corps's decision to require a change in the configuration of one component of Great Lakes's dredging equipment, we see nothing about the agency action that is improper, or about the IFB that converts a concern about the capacity of the equipment to a matter of bid responsiveness. An agency's decision to require bidders to submit with their bids a detailed equipment schedule does not operate to convert matters of equipment capacity to matters of bid responsiveness. Wright Assocs., Inc., B-238756, June 12, 1990, 90-1 CPD ¶ 549; Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 CPD ¶ 444. In addition, when the information provided in such schedules provokes a concern that the bidder may not be able to perform as claimed, agencies should allow a prospective awardee a reasonable period of time after bid opening to cure a problem related to the capacity of proposed equipment. Id.⁴

Since the equipment schedule here does not convert questions about capacity to matters of responsiveness, and since there was nothing improper about requiring Great Lakes to modify its equipment to address the Corps's concerns, the remaining issue is the guaranteed production rate calculated by the bidder and entered on the pricing schedule. Despite Luhr's claim that the agency is not addressing the major role the production rate plays in determining a bidder's price, we note again that no term on the price schedule submitted with Great Lakes's bid has changed: from bid opening to award, Great Lakes committed to performing the dredging work here at \$1,225 per hour, and to do so at a guaranteed production rate of 870 cy/hr. In addition, Great Lakes has clearly bound itself to perform the services called for in the IFB, and nothing on the face of the bid limits, reduces, or modifies its obligation to perform in accordance with the terms of the IFB. See Bishop Contractors, Inc., supra. Since nothing about these terms changed, and since the Corps's concerns went to the capacity of Great Lakes's dredge to perform the work, we fail to see how Great Lakes's bid can be termed nonresponsive.

⁴See also M-S and Assocs., B-183282, May 14, 1975, 75-1 CPD ¶ 296, where we held that a bid was improperly rejected as nonresponsive after the Corps determined that the offered dredge listed in the bid documents did not appear capable of meeting the performance requirements of the IFB, but the Corps failed to consider proposed changes to be made prior to award that would cure the deficiency.

Finally, in its comments on the agency report, Luhr raises other complaints about the agency's acceptance of Great Lakes's bid that appear to raise issues beyond the scope of the initial protest--such as whether the agency held improper discussions with Great Lakes, whether the agency should have viewed Great Lakes's bid as one containing a mistake not properly correctable, or whether the agency acted erroneously in concluding that Great Lakes was a responsible bidder. These issues are not timely raised. All of the facts surrounding the Corps's concern about the capacity of the Great Lakes equipment were available to Luhr at the time it filed its initial protest, and thus should have been presented at that time. 4 C.F.R. § 21.2(a)(1). With respect to Luhr's claim that Great Lakes should not have been found responsible, our Office does not consider challenges to an agency's affirmative determination of a bidder's responsibility absent a showing that such determination may have been made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met, 4 C.F.R. § 21.3(m)(5); Dynamic Energy Corp., H-235761, Oct. 6, 1989, 89-2 CPD ¶ 325, neither of which is present here. Therefore, we will not consider these additional issues.

The protest is denied.


James F. Hinchman
General Counsel